FILE COPY

No. 178.

FILED

MAR 9 1932

CHARLES [illegible]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

WILLIAM J. STRATTON, as Secretary of State of the State of Illinois, Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois.

PETITION FOR REHEARING.

J. R. TURNEY,
JOSIAH WHITNEL,
Counsel for Appellee (Petitioner).

Of Counsel:
CARTER, JONES & TURNEY,
H. L. BROWNING.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

No. 178.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

WILLIAM J. STRATTON, as Secretary of State of the State of Illinois, Appellant, vs. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellee.	Appeal from the District Court of the United States for the Southern District of Illinois.

PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

Appellee respectfully petitions for a rehearing herein and as grounds therefor suggests that the Court has overlooked matters which render inadequate the remedy at law outlined in the Court's opinion.

Assuming appellee had paid the contested tax to the Secretary of State of Illinois, under duress and with protest, there is no statute or rule of law in Illinois which

would have entitled appellee, as a matter of right, to an injunction restraining the Secretary of State from paying such tax over to the Treasurer, until after final decree on the merits.

We respectfully contend that the statute quoted in the Court's opinion cannot be construed as conferring any right of injunctive relief on objecting taxpayers. Its sole effect is to require tax collecting officers to pay the moneys paid under protest to the Treasurer within a specified time—excepting only if such taxpayer secures an injunction. For the Court's convenience we again quote the statute:

> "It shall be the duty of every officer, board, commission, commissioner, department, institute, arm or agency brought within the provisions of this act by section 1 hereof, to hold for thirty days all moneys received for or on behalf of the state under protest and on the expiration of such period to deposit the same with the State Treasurer, unless the party making such payment shall, within such period, file a bill in chancery and secure a temporary injunction restraining the making of such deposit, in which case such payment shall be held until the final order or decree of the Court."

Whether the objecting taxpayer secures a temporary injunction will depend on whether or not the Illinois Court determines his bill of complaint to state cause for such relief. If the Court should be convinced that the tax

was lawfully collected, there is no reason why it might not properly refuse a temporary injunction. We find no Illinois case which holds the taxpayer to be entitled to a temporary injunction as a matter of right, or that the application for such an injunction is the exclusive remedy.

Once the tax money, even though paid under protest and duress, is turned into the State Treasury, it is lost beyond recall, for the State of Illinois cannot be sued.

Section 2B of the statute referred to in the Court's opinion makes a felon of the Secretary of State if, without being enjoined, he fails to pay over to the State Treasurer within thirty days any moneys collected under protest. (See Smith-Hurd's 1931 Revised Illinois Statutes, Chap. 127, Par. 172, § 2(b), cited on page 5, "Appellee Memoranda of Authority on Equity Jurisdiction," filed with permission of the Court after reargument.)

If appellee had paid the tax under protest, and had been unable to secure a temporary injunction, then it could not hold the Secretary of State personally liable, as his act in receiving and paying the money over to the Treasurer is an administrative one performed specifically as required by the statute referred to in the Court's opinion. (See cases cited on page 5 of Appellee's Memoranda.)

In practice, the Attorney-General has always assented to the issuance of temporary injunctions in such cases, and the Circuit Court of Sangamon County, Illinois, has always heretofore acquiesced therein. If the procedure suggested by the statute is the sole remedy, then, should

the Attorney-General change his disposition and contest applications for temporary injunction, or if the Court, on its own motion, should refuse to allow such application, then, after the moneys were paid into the state treasury and commingled with the state funds, the taxpayer would be without any possible remedy.

Suits against the collecting officers have been maintained only where such officer has, at the time, possession of the contested tax money. (See, again, the cases of Yates v. Royal Ins. Co. and School of Domestic Arts v. Harding, cited in the Court's Opinion.)

The situation is, without doubt, this:

1. Appellee could not pay the tax and recover in a suit against the State of Illinois.

2. Appellee could not recover a personal judgment against the Secretary of State if he, after payment under protest and without being enjoined, paid the tax money into the state treasury.

3. Appellant is not entitled, as a matter of right, to an injunction restraining appellee from paying the tax money into the treasury until the merits of the case have been determined. The Circuit Court of Sangamon County could, if satisfied the tax was legal, refuse to issue a temporary injunction. The Supreme Court of Illinois could refuse a supersedeas.

4. Appellee would then have no remedy, even though the tax be illegal.

By reason thereof we earnestly contend any legal remedy is inadequate, and under the principle referred to and authorities cited in the last paragraph of the Court's opinion appellee is entitled to equitable relief.

Respectfully submitted,

J. R. TURNEY,
JOSIAH WHITNEL,
Counsel for Petitioner.

CARTER, JONES & TURNEY,
H. L. BROWNING,
Of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Josiah Whitnel